



## **Administrative Conference Statement # 18**

### **Improving the Timeliness of OIRA Regulatory Review**

**Adopted December 6, 2013**

For more than three decades, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has conducted centralized review of federal agencies' draft proposed and final regulations. The fundamental structures and principles governing the regulatory review process are currently set forth in Executive Order (EO) 12,866,<sup>1</sup> and subsequent EOs have reaffirmed this system of regulatory review.<sup>2</sup> Among other things, Executive Order 12,866 requires covered agencies to submit all "significant regulatory actions" to OIRA for review.<sup>3</sup> The purposes underlying the centralized OIRA regulatory review process include: ensuring consistency with applicable laws and presidential priorities; enhancing coordination of regulatory policy among federal agencies; examining economic analyses accompanying the rule; and making the regulatory process more efficient.<sup>4</sup> OIRA regulatory review serves to monitor agency rulemaking activity to ensure adherence with administration policy<sup>5</sup> while also seeking to provide a "dispassionate and analytical 'second opinion' on agency actions."<sup>6</sup>

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<sup>1</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). These basic structures were carried over from Executive Order 12,291, issued during the Reagan Administration. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

<sup>2</sup> See, e.g., Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>3</sup> Exec. Order No. 12,866 § 6(a)(3)(B)–(C); see also *id.* §§ 3(b) (generally defining covered "[a]genc[ies]" as federal departments and other executive branch establishments, but not independent regulatory agencies), 3(f) (defining "[s]ignificant regulatory action").

<sup>4</sup> *Id.* §§ 2(a)–(b), 6(a)(3)(B)–(C), 6(b); see also Exec. Order No. 13,563 § 1.

<sup>5</sup> *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) ("The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.").

<sup>6</sup> President Barack H. Obama, Memorandum on Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009).



In order to ensure that OIRA review proceeds in a timely manner, EO 12,866 generally requires OIRA to “waive review or notify the agency in writing of the results of its review” within 90 calendar days following submission.<sup>7</sup> The executive order also provides that the review process may be extended “(1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.”<sup>8</sup>

Executive review of agency rulemaking, and, more precisely, OIRA’s role in the review process—though not without controversy<sup>9</sup>—are now firmly entrenched fixtures of the administrative landscape,<sup>10</sup> and each administration since at least that of President Ronald Reagan has endorsed them.<sup>11</sup> For such reviews to be effective, however, they must be timely. All stakeholders in the regulatory process—including the submitting agency, potentially regulated entities, other interested participants, and the general public—have an interest in seeing the OIRA review process operate as efficiently as possible for several reasons: agency regulatory or scientific assessments may become out of date when reviews are overlong; likewise, regulated markets or industries might experience uncertainty when proposed or final rules remain stalled in the review process; and, for rules related to health or safety, delay in the

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<sup>7</sup> Exec. Order 12,866 § 6(b)(2). Indeed, this Executive Order specifically underscores the importance of timeliness in the regulatory review when stating: “An efficient regulatory planning and review process is vital to ensure the Federal Government’s regulatory system best serves the American people.” *Id.* § 2.

<sup>8</sup> *Id.* § 6(b)(2)(C).

<sup>9</sup> See, e.g., Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 *FORDHAM URB. L.J.* 1097 (2006); Alan Morrison, *Commentary, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 *HARV. L. REV.* 1059 (1986); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 *ENVTL. L.* 1083 (2007); cf. Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696 (2007).

<sup>10</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* 1337 (2013); Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *HARV. L. REV.* 1838 (2013).

<sup>11</sup> See Special Edition, OIRA Thirtieth Anniversary Conference, 63 *ADMIN. L. REV.* 1 (2011). Jim Tozzi, who served at the Office of Management and Budget for over 10 years and was instrumental in the creation of OIRA, suggests that executive rulemaking review began during the Nixon Administration. *Id.* at 37.



OIRA review process could well have serious social consequences.<sup>12</sup> In addition, the timing of review process should be made as transparent as possible.

Historically, OIRA has completed most of its reviews of agency rules well within the 90-day review period.<sup>13</sup> For example, from 1994 - 2011, the average time for OIRA review was 50 days for all rules.<sup>14</sup> Since 2011, however, average OIRA review times have trended significantly upward. In 2012, the average time for OIRA review for all rules rose to 79 days, and in the first half of 2013, the average review time increased even further to 140 days.<sup>15</sup> It is important to note that, as OIRA completes review for rules that have been in the backlog for some time, the average review times will likely increase, which evidences an improving situation. Approximately four dozen reviews completed in 2013 have taken more than a year.<sup>16</sup>

However, average review times and the length of completed reviews are lagging indicators of OIRA performance, and the recent increases in average review times reflect the significant headway that OIRA has made during the past year in reducing the backlog of rules and improving review timeliness. The number of ongoing reviews lasting more than one year

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<sup>12</sup> Institute for Policy Integrity, Public Comment 1–2 (Oct. 28, 2013) (noting that delays can postpone realization of benefits associated with proposed rules, create uncertainty amongst regulated parties, and damage public perception of OIRA). For example, at an FDA public meeting on September 19–20, 2013, Sandra Eskin, director of food safety at the Pew Charitable Trusts, noted several food safety rules that were required by the Food Safety Modernization Act in January 2011 had not been issued, and said the “longer it takes these rules to be put in place, the more people will needlessly be put at risk and the less confidence consumers will have in the safety of the food supply.”

<sup>13</sup> CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 25 (Nov. 1, 2013), available at <http://acus.gov/sites/default/files/documents/Revised%20Draft%20OIRA%20Report%20110113%20CIRCULATED.pdf>.

<sup>14</sup> See Off. Info. & Reg. Aff., Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Nov. 14, 2013) (allowing searches of OIRA review counts and average review times by date range).

<sup>15</sup> *Id.*

<sup>16</sup> Off. Info. & Reg. Aff., Executive Order Review Search Results, <http://www.reginfo.gov/public/do/eoAdvancedSearch> (last visited Nov. 14, 2013) (allowing identification of the number and length of OIRA reviews completed within a date range). The time periods cited herein are for formal review after a complete rulemaking package is received by OIRA and do not reflect any informal review that may have occurred prior to receipt.



has been cut from 51 reviews in mid-May 2013 to 27 reviews in mid-September 2013. Of the 38 reviews that, as of June 30, 2013, had been ongoing for more than a year, 14 of them were completed by mid-September 2013. Rules submitted more recently were also being reviewed more quickly. Only 10 percent of the reviews of rules submitted between September 2012 and February 2013 took more than six months to complete, compared to nearly 30 percent for reviews completed during the first six months of 2013 (regardless of when they were submitted).

Senior agency employees provided a variety of perspectives as to why they believe that OIRA review times increased in 2012–13, including one or more of the following reasons: (1) concerns by some in the Executive Office of the President (EOP) about the issuance of potentially costly or otherwise controversial rules during an election year, (2) coordinative reviews by other agencies and offices within EOP took more time than in preceding years,<sup>17</sup> and (3) a reluctance by OIRA to use return letters. Both senior agency employees and other observers (including several former OIRA officials) also suggested that a decrease in OIRA staffing in recent years may have been another contributing factor. In addition, the executive review process has become more complicated for all parties involved as regulations have grown increasingly complex, interagency coordination has become more important, and various transparency and procedural requirements have grown more demanding.

The Administrative Conference has long supported effective executive review of agency rulemaking, and has emphasized the importance of timeliness and transparency in this process. In Recommendation 88-9, the Conference stated that “[t]he process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable

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<sup>17</sup> Notwithstanding these concerns about increased review times in the period from 2012–13, the Administrative Conference reaffirms the importance of the interagency review process to ensuring that rulemaking agencies consider input from sister agencies and the EOP. See Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 1, 54 Fed. Reg. 5207 (Feb. 2, 1989) (“[Presidential review] can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities.”).



administrative, executive, judicial and statutory deadlines.”<sup>18</sup> Similarly, in Recommendation 93-4, the Conference asserted that “the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process.”<sup>19</sup> The Conference has also issued several recommendations advocating a transparent OIRA review process.<sup>20</sup>

Building upon these prior Conference initiatives addressing executive review, the Conference now offers a discrete set of principles for improving the timeliness of review and the transparency concerning the causes for delay. The OIRA review process involves many components and participants. Delays may not be attributable to any single cause but rather can arise from multiple factors (and complex interactions amongst them) involving numerous players, including OIRA, agencies submitting rules for review, and other agencies and offices in the interagency review process (including other parts of the EOP). As a result, the Conference wishes to highlight a number of principles that OIRA and agencies should consider to improve review times and enhance transparency concerning the timing of the review process.

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<sup>18</sup> Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, ¶ 3, 54 Fed. Reg. 5207 (Feb. 2, 1989).

<sup>19</sup> Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 22, 1994).

<sup>20</sup> Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 5, 54 Fed. Reg. 5207 (Feb. 2, 1989) (“An agency engaged in informal rulemaking should be free to receive guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice of proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule.”); Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, ¶ 2, 45 Fed. Reg. 86,407 (Dec. 31, 1980) (“When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding.”).



The Conference reaffirms its long-term support of the basic presidential regulatory review process<sup>21</sup> and seeks to ensure that it functions as effectively and efficiently as practicable. The values of transparency, credibility, management effectiveness, and the rule of law apply to the executive review process, even if it is not subject to judicial oversight.

The following principles suggest ways that both OIRA and the agencies can promote timely and transparent OIRA review:

1. The Office of Information and Regulatory Affairs (OIRA) should, whenever possible, adhere to the timeliness provisions of Executive Order (EO) 12,866. The Administrator of OIRA should continue to focus on improving OIRA review times. In so doing, the Administrator should consider preparing a publicly available document that identifies any specific policies that OIRA, regulatory agencies, and other agencies participating in interagency review should undertake in order to ensure that the measures of timeliness return to historical averages under this executive order.

2. Agencies and OIRA should coordinate prior to the submission of a completed rulemaking package. To the extent possible, OIRA should use the regulatory planning process created by section 4 of EO 12,866 to identify all of the relevant entities, establish lines of communication among them, and create workplans with timelines and responsibilities for action. The section 4 process should be used to identify the principal factual and policy issues likely to be raised by a proposed rulemaking and to convey any presidential priorities respecting them. OIRA should hold itself available to mediate such disputes among the identified agencies

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<sup>21</sup> See, e.g., Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994) (“We continue to support presidential coordination of agency policymaking as beneficial and necessary.”); Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989) (“Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities.”); Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980) (“Because the President, as the nation’s Chief Executive, may be deemed accountable for what agencies do, efforts to achieve policy coordination through Presidential channels have become increasingly significant.”).



as may arise, and to assure that all participating agencies place a high priority on the resulting processes, so as not to cause undue delays.

3. Though OIRA has the final authority for determining which rules will be classified as “significant,” the agency should decide the point at which it will submit a draft rule to OIRA for review under EO 12,866. Once an agency has submitted a completed rulemaking package with approval from the appropriate senior agency official(s) within the meaning of EO 12,866, the clock for the review period should commence.

4. In connection with interagency review, OIRA should promptly send the draft rule to all of the relevant entities and, to the extent feasible, establish a timeline by which these entities should submit comments. All participating entities should place a high priority on the review process so as to avoid undue delays.

5. If OIRA concludes that it will be unable to complete the review of an agency’s draft rule within a reasonable period of time after submission, recognizing the timeframes established in section 6(b)(2) of EO 12,866 and the nature of the matter—but in no event beyond 180 days after submission—OIRA should inform the public as to the reasons for the delay or return the rule to the submitting agency.

6. OIRA’s staffing authorization should be increased to a level adequate to ensure that OIRA can conduct its regulatory reviews under EO 12,866 in a timely and effective manner. In addition, or as an alternative, staff from rulemaking agencies could be detailed to OIRA.